Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	

COMMENTS OF
KMC TELECOM, INC AND XSPEDIUS COMMUNICATIONS, LLC

Michael B. Hazzard
WOMBLE CARLYLE SANDRIDGE & RICE PLLC
1401 Eye Street, N.W., Seventh Floor
Washington, D.C. 20005

Counsel to KMC Telecom, Inc. and Xspedius Communications, LLC

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KMC Telecom, Inc. ("KMC") and Xspedius Communications, LLC ("Xspedius") (collectively "Joint Commenters"), through counsel, hereby submit their comments in response to the March 3, 2005 Further Notice of Proposed Rulemaking in the above-referenced proceeding.[1]

I. INTRODUCTION AND SUMMARY

Intercarrier compensation reform is key to encouraging on-going convergence, which will foster the growth of a network of private networks that seamlessly interoperate across technologies, across services, and across the country. In systematizing and rationalizing the current hodgepodge of intercarrier compensation systems, the Commission no doubt will have to wrestle with the twin goals of promoting fair competition and universal service in a manner consistent with the legislative directives set forth in Communications Act of 1934, as amended ("Act").[2] The history of intercarrier compensation and universal reform efforts since the 1996 amendments to the Act has demonstrated that recalibrating if not ultimately resolving these issues will be difficult at best. That said, wide support exists for the Commission's fundamental

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[1] *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, FCC 05-33, CC Docket No. 01-92 (rel. Mar. 3, 2005) ("FNPRM").
[2] 47 U.S.C. §§ 151 *et seq.*

goal of developing an intercarrier compensation regime that is unified across jurisdictions and technology platforms (*e.g.*, wireline and wireless).

The overarching challenge before the Commission is to create a unified system that is both equitable and consistent with the many provisions of the Act that directly and indirectly touch on intercarrier compensation. Many parties recognize that the jurisdictional distinctions (*i.e.*, intrastate versus interstate) and service definitions (*e.g.*, telecommunications service versus information service) are and will continue to be difficult to sustain as technology evolves, and that the existing disparate systems have caused numerous problems. That said, the existing law codifies both jurisdictional distinctions and service distinctions, and faithful implementation of the statute must be a prerequisite to any Commission action. Congress did provide the Commission with a variety of tools, such as forbearance and preemption, that may be utilized to overcome statutory distinctions that are no longer sustainable; however, the Joint Commenters submit that the industry would be far better off if the Commission were able to come to a unified result consistent with the Act without resorting to such blunt instruments. Accordingly, the Commission should utilize its forbearance and preemption tools judiciously, if at all, and in cooperation with interested parties, including the state public service commissions.

Importantly, groups from virtually all industry segments at least ostensibly support unifying intercarrier compensation rates across jurisdictions and service platforms. Indeed, the compensation principles set forth by the Commission, the National Association of Regulatory Utility Commissions ("NARUC"), and others largely echo common goals. Although many parties share common goals, no single plan currently before the Commission wholly satisfies the Act or the Commission's policy objectives. Therefore, Joint Commenters submit that the

Commission will not be able to adopt any one plan in its entirety. Rather, the FCC will need to develop its own plan, based on the plans presently before the Commission and informed by commenting parties, in order to satisfy the Commission's goals and the Act.

Joint Commenters commend the Commission's focus on encouraging facilities-based competition. In the FNPRM, the Commission expressly stated that one of its "most important policies is to promote facilities-based competition in the marketplace."[3] Indeed, an approach that encourages the further development of efficient competition is consistent with the goals of the 1996 Act, which was intended to both open markets to competitive entry and promote increased competition in telecommunications markets.[4] The Commission must ensure that it encourages facilities-based competition in all market segments: residential as well as business, including small and large business customers.

Both KMC and Xspedius own and operate substantial telecommunications facilities, and fair competition requires that competitive carriers have the same ability as incumbents to recover network investment in part through intercarrier compensation. Promoting facilities-based competition similarly requires that the Commission continue to follow the interconnection provisions of the Act and nine years of Commission precedent – precedent designed to encourage facilities-based competition by mandating that competitors and incumbents be treated as co-carriers. The existing network interconnection rules have been largely stable since first issued by the Commission in 1996, and the Commission should not lightly consider changes that could result in disrupting or devaluing competitive networks that

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[3] FNRPM at ¶ 31 (citation omitted).
[4] *Id.*

have been deployed and continue to be employed based on the Act and the Commission's interconnection rules and orders.

One principal challenge is establishing a uniform intercarrier compensation rate for terminating (and perhaps transiting) traffic. The key task is for the Commission to establish a methodology for this rate that is consistent with the Act and supported by other industry players, including the state commissions. A mandatory rate of zero for termination (*i.e.*, "bill and keep") already has been rejected by the Commission in instances where traffic imbalances exist. Indeed, there can be no doubt that Congress intended carriers originating telecommunications traffic to pay other carriers for transporting and terminating calls.[5] Moreover, as a policy matter, coercing carriers to perform network functions, such as transport and termination, without any compensation will discourage facilities-based competition and robust interconnection rather than promote it. In considering creative new approaches, the Commission must weigh heavily in the balance the pragmatic impact on companies that have already invested in facilities with legitimate expectations of recouping costs and obtaining a return on that investment.

Unification should serve to rationalize rates, terms, and conditions for the transport and termination of calls based on economics, rather than arbitrary and increasingly fuzzy jurisdictional constructs. Doing so in a matter consistent with the Act, however, can most readily be achieved by cooperation between the FCC and state commissions and the adoption of uniform rates set no lower than the existing TELRIC standard.[6] Indeed, unification through adoption of the TELRIC standard across the various jurisdictions will go a long way toward

[5] *See*, *e.g.*, 47 U.S.C. §§ 251(b)(5), 252(a), 252(b), 252(d)(2).

[6] To the extent the Commission modifies the TELRIC standard to increase rates through WC Docket No. 03-173 (or otherwise), any new or modified standard should apply equally to network elements, interconnection, and transport and termination, as it does today.

eliminating the tyranny of geography that presently pervades the existing patchwork system. As just one example, a focus on functionality rather than geography will eliminate effectively all of rating and routing issues that have troubled the Commission for years. The Commission developed TELRIC, it has been sustained by the Supreme Court as a reasonable cost-based methodology,[7] and the states have substantial experience developing TELRIC rates as part of their statutory responsibilities under section 252 of the Act.[8] Although TELRIC may not be perfect, it is eminently satisfactory and should be utilized by the Commission barring a compelling reason to the contrary.

Any comprehensive intercarrier compensation reform effort also should address transiting traffic. Again, the overarching point of intercarrier compensation is to reasonably encourage parties to interconnect with one another to ensure that traffic can flow unfettered across networks regardless of the type of network being utilized or the type of service offered. Towards that end, just as the Commission should utilize a rate no lower the incumbent LEC's TELRIC rate for intercarrier compensation, the Commission should do the same for transit service. Through adopting a common cost standard for all intercarrier functions, the Commission would further its goal of developing a truly unified system that encourages interconnection and reasonably compensates interconnecting carrier for use of their networks by others.

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[7] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999).

[8] Under section 252 of the Act, state commissions have responsibility for setting rates for unbundled network elements ("UNEs"), transport and termination, and other items in accordance with the Commission's TELRIC methodology. *See* 47 U.S.C. §§ 252(d)(1) and (2). The Commission has reviewed state commission TELRIC rates many times as part of the section 271 long distance approval process, and never once has the Commission found that a state commission failed to adequately follow the TELRIC methodology.

As for implementation, the Joint Commenters again submit that the Commission should focus on implementing the Act in a faithful way. Rates set by state commissions pursuant to section 251 and 252 should be included in interconnection agreements entered into by the parties. In cases where parties are not directly interconnected, or where access traffic is at issue, the Commission should support tariffed-based intercarrier compensation arrangements that: (i) set rates no higher than the comparable TELRIC rates and (ii) permit carriers to supersede tariffs through interconnection agreements. Finally, the Commission should make clear that any new scheme established institutes default rules, which may be modified by agreement of contracting parties, subject to other requirements of the Act (*e.g.*, filing with and approval by state commissions as necessary).

Finally, regarding administration of universal service funds ("USF"), there can be no doubt that the Commission needs to expand the base over which USF is assessed in order to make the program sustainable. USF administration must remain consistent with the Act, and accordingly, universal service support must be explicit, remain portable, and not guarantee a level of funding to any individual carrier. In addition, USF must be carefully cabined to a limited number of services. USF funding is not a revenue assurance plan for carriers; rather it is a mechanism that ensures that consumers have access to reasonable telecommunications services – not all possible services. Accordingly, the Commission should avoid the temptation of utilizing universal service as a revenue assurance program for individual carriers in the wake of a decline in intercarrier compensation.

II. KMC AND XSPEDIUS HAVE MADE SUBSTANTIAL NETWORK INVESTMENTS AND PLAN TO CONTINUE TO INVEST IN FACILITIES

The Commission appropriately cites encouraging facilities-based competition as a primary goal, and intercarrier compensation reform is a critical piece of that puzzle. As described below, both KMC and Xspedius have invested substantial sums in deploying state of the art telecommunications networks throughout much of the nation. The Commission's on-going support of facilities-based competition is critical to their individual ability to continue to maintain existing facilities and to deploy new facilities in the future.

A. KMC Telecom

KMC is among the largest privately held nationwide telecommunications company in the United States. Founded in 1995, KMC has two distinct divisions that focus on two select customer sets. The Nationwide Data Services Division provides consulting, financing, engineering, and operations support for national, regional, and local access infrastructures, as well as to Cable MSOs, ISPs, IXCs, utility and power companies, and wireless carriers. The Advanced Communications Services Division offers voice, data, and Internet in 35 Tier III markets across the eastern half of the United States to local businesses, organizations, and enterprises. Together, these two divisions generated over $500 million in revenue in 2002, and KMC has deployed over $1.4 worth of networks, property, equipment, and related infrastructure.

KMC utilizes Synchronous Optical Network technology throughout its fiber backbone connecting to Class 5 switches providing a full array of local and long distance voice, data, and Internet services. In addition, KMC's facilities and infrastructure includes:

- 1.5 million ports of local Internet access;

- Thirteen Tier I Softswitch platforms with 200,000 ports installed, and 200,000 being installed;
- Access to 1,400 nationwide Local Calling Areas;
- 70 “super nodes” serving 340,000 Voice over IP (“VoIP”) ports;
- 24 x 7 x 365 Network Operations Center;
- Nationwide ILEC Certification for EF&I collocations; and
- Nationwide interconnection agreements with all major LECs and IXCs.

KMC built its network based on the requirements of the Act and the Commission’s intercarrier compensation and interconnection rules and policies. Any modifications to those rules and policies should value KMC’s invest and further incent additional investment.

B. Xspedius Communications

Xspedius is a facilities-based carrier focused on bringing integrated telecommunications services to small and medium-sized enterprises in the southern United States. Xspedius has deployed switching and transport equipment from Baltimore, Maryland in the East to Las Vegas, Nevada in the West, and practically everywhere in between in the South and Southeast.

First and foremost, Xspedius is a local services telecommunications provider. Xspedius’ integration of local, data, and long distance telecommunication service creates a compelling value for customers. Xspedius is able to offer its integrated packages while maintaining quarter-over-quarter financial improvement.

Xspedius was created through the consolidation of several telecommunications companies. The company’s initial footprint consisted of six facilities-based cities - Lake Charles, Baton Rouge, Lafayette, Memphis, Nashville, and Greensboro/Winston Salem. In August 2002, Xspedius purchased substantially all of the assets of e.spire Communications. The e.spire acquisition created a combined telecommunications company providing service in 55 markets in more than 20 states with in excess of 3,500 total route miles of fiber, over 600 on-net buildings, and over 150 collocated end offices. In January 2003, Xspedius acquired Mpower Communications' Texas assets, which resulted in the addition of more than 7,000 customers and over 70 end office collocations in the Dallas/Fort Worth, Houston, Austin, and San Antonio markets. In April of this year, Xspedius purchased the business and assets of ICG Communications Inc. in five major markets across the Southeast, adding another 194 buildings and 500 more fiber miles to its network. The ICG acquisition enhanced Xspedius' already strong presence in Atlanta, Birmingham, Louisville, and Nashville, and also brought Charlotte, North Carolina into the Xspedius footprint.

Xspedius' vibrant history and future center on growth that springs from its fiscally responsible business strategy and opportunistic asset acquisition, which has allowed Xspedius to drive revenue and profit internally – as Xspedius has done for eight straight quarters. To continue this trend, however, the Commission must develop an intercarrier compensation regime and maintain interconnection rules that support carriers in their efforts to deploy facilities in a way that is efficient and enables reasonable cost recovery.

III. INTERCARRIER COMPENSATION – THE PROBLEMS AND THE GOALS OF REFORM

The FCC has largely described the scope of the problem correctly. Existing compensation regimes are based on geography (*i.e.*, jurisdiction) and traffic type (*e.g.*, ISP-bound) – even though the Commission has repeatedly concluded that the cost of terminating all traffic types is the same. Indeed, the history of implementing the 1996 Act demonstrates that maintaining artificial rate distinctions based on geography or on traffic type not only is inappropriate from an economic and policy perspective, but also administratively expensive and fraught with litigation. By the same token, many jurisdictional distinctions are codified in the Act, and the legal sustainability of any new regime is critical. Since their founding, both KMC and Xspedius have been forced to spend literally tens of millions of dollars to avail themselves of their interconnection and intercarrier compensation rights under the Act, the Commission's rules, and state rules. The Joint Commenters submit that the Commission should learn from the past and move forward into the future. In so doing, the Commission should follow the intercarrier compensation principles set forth in the press release to the FNRPM.[9] If followed in a manner consistent with the Act's statutory underpinnings, the Commission's broadly-supported reform principles will yield a fair and lawful intercarrier compensation system.

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9 *FCC Acts to Eliminate Outmoded Intercarrier Compensation Rules*, News Release (Feb. 10, 2005).

A. The Commission Must Learn From The History Of Intercarrier Compensation Implementation Under The 1996 Amendments To The Act

Although it is well recognized that "those who cannot learn from history are doomed to repeat it," others counter that "we learn from history that we learn nothing from history." In this proceeding, the Commission has a tremendous opportunity to learn from the implementation history of the 1996 amendments to the Act if it so chooses. As demonstrated below, the principles established and insights suggested in the Commission's earliest local competition orders charted a proper course. That proper course, however, was disrupted by results-oriented decisionmaking, which led to a string of court decisions against the Commission, and much of the regulatory uncertainty that exists today.

1. Prologue to the Local Competition First Report and Order

Although it may be surprising to some, the Joint Commenters note that Bell Atlantic, as early as its initial May 16, 1996 comments in the Commission's local competition proceeding described the basic parameters of the scheme established by Congress in the 1996 Act. In those comments, Bell Atlantic noted as follows:

> The Act also imposes a duty on all local exchange carriers – incumbents and new entrants alike – to establish reciprocal compensation arrangements for the "transport and termination" of telecommunications. In contrast to the interconnection provision in section 252(d)(2), which applies to the physical connection between the competing networks, the reciprocal compensation provision applies only to the transport and termination of local calls that originate on another carrier's network once physical interconnection has been established. The reciprocal compensation provision is accompanied by a separate pricing standard – to be applied by state commission in any arbitration proceedings under section 252 – that is tailored to the particular circumstances when it applies.

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Specifically, the Act provides that a state commission shall not consider arrangements to be just and reasonable unless they provide fro the mutual and reciprocal recovery by each carrier of the additional costs incurred to terminate calls that originate on the other carrier's network. Unlike the pricing standard for interconnection and access to network elements, this provision does not require that the price ultimately set be "based on cost," but instead establishes a price minimum. Accordingly, the parties must, at a minimum, be able to recover their costs on a reciprocal basis. Precisely because these arrangements are reciprocal, however, and each party must pay the other reciprocal rates, the Act establishes only a minimum, and leaves it to the parties to determine the price above this minimum.

The Act also permits a limited exception to this general rule. The pricing standard does not "preclude" arrangements between parties that allow the recovery of costs through the "offsetting reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements.) Section 252(d)(2)(B)(i) (emphasis added). By its very terms, this provision creates an exception to the right to recover the costs of transporting and terminating calls only where the parties voluntarily waive this right…. [The Act] does not, however permit arrangements such as bill and keep to be imposed by regulatory mandate, whether in the context of an arbitration or as an interim measures.

*   *   *

Nor would mandating bill and keep make sense from an economic or policy standpoint, even if such mandatory arrangements were not already forbidden by the Act and the Constitution. Mandating bill and keep would force LECs to terminate calls on their networks at a zero rate that is unquestionably below cost. This would create a subsidy for competing providers … who by no stretch of the imagination are in need of one. It would do so, moreover, at a time that Congress has directed the Commission to eliminate hidden subsidies, and would force the LECs' other customers to bear the cost of this subsidy. And because bill and keep frees a competing provider from any accountability for the costs it imposes on the incumbent LEC, bill and keep eliminates any incentive to use the LECs' termination service efficiently and will lead to economically wasteful behavior….[10]

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[10] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Comments of Bell Atlantic at 40-42 (May 16, 1996) (internal citations omitted).

Accordingly, from the outset, even Bell Atlantic agreed that the Act requires that rates for intercarrier compensation must be reciprocal, symmetrical, and set by the state commissions under the Act. Moreover, although parties may voluntarily agree to a compensation rate of zero, such a rate may not be mandated under the Act.

In its subsequent reply comments, Bell Atlantic further elaborated on its position. Foremost, Bell Atlantic noted that "[t]he most blatant example of a plea for a government hand out comes from those parties who urge the Commission to adopt a reciprocal compensation price of zero, … euphemistically referred to as 'bill and keep.'"[11] Bell Atlantic continued that a "more appropriate name … would be '<u>bilk</u> and keep,' since it will bilk the LECs' customers out of their money in order to subsidize"[12] other carriers.

Furthermore, elaborating on the economic incentives created by its proposal to the Commission, Bell Atlantic clarified:

> [T]he notion that bill and keep is necessary to prevent LECs from demanding too high a rate reflects a fundamental misunderstanding of the market. If these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound, such as credit card authorization centers and **internet access providers**. The LEC would find itself writing large monthly checks to the new entrant. By the same token, setting rates too low will merely encourage new entrants to sign up customers whose calls are predominantly outbound, such as telephone solicitors. Ironically, under these circumstances, the LECs' current customers not only would subsidize entry by competitors, but would subsidize low rates for business they may well not want to hear from.[13]

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[11] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Reply Comments of Bell Atlantic at 20 (May 30, 1996).

[12] *Id.* (emphasis original).

[13] *Id.* at 21 (emphasis added). Of course, nothing prohibits Bell Atlantic, Verizon, or any other carrier from serving credit card authorization companies or Internet service providers.

Bell Atlantic's overarching point could not have been more clear – setting the correct rate level is key. If a termination rate is set too high, carriers will be incented to focus on termination services. If a termination rate is set too low, carriers will be incented to focus on origination services. The best rate would be one that makes a carrier indifferent as to whether it: (i) terminates traffic itself or sends traffic to another carrier for termination and (ii) serves customers that disproportionately terminate or originate traffic. Although no perfect rate likely exists, the closer the Commission comes to such a rate, the more successful this proceeding will be.

2. The 1996 Local Competition First Report and Order

In accordance with the statutory mandate, the Commission released its first rules implementing sections 251 and 252 of the 1996 Act on August 8, 1996.[14] Although many items in the *Local Competition First Report and Order* were controversial and some were ultimately overturned through subsequent legal action, the reciprocal compensation rules promulgated by the Commission were largely supported by the industry.

At the outset, the Commission recognized that "transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions."[15] Accordingly, the Commission noted its belief "that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge."[16] As a statutory matter, however, the FCC recognized that "transport and termination of local traffic are different services than access services for long

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[14] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition First Report and Order*") (subsequent history omitted).

[15] *Id.* at ¶ 1033.

[16] *Id.*

distance telecommunications," with reciprocal compensation "governed by sections 251(b)(5) and 252(d)" and access charges "governed by sections 201 and 202 of the Act."[17]

Largely following the conceptual analysis contained in Bell Atlantic's comments and reply comments, and supported by many others, the FCC adopted symmetrical reciprocal compensation rate structures based on the incumbent LEC's forward looking cost. In doing so, the Commission concluded that "using the incumbent LEC's forward-looking costs for the transport and termination of traffic as a proxy for the costs incurred by interconnecting carriers satisfies the requirement of section 252(d)(2) that costs be determined 'on the basis of a reasonable approximation of the additional cost of terminating such calls.'"[18]

As the Commission explained, a "symmetric compensation rule gives the competing carriers correct incentives to minimize its own costs of termination because its termination revenues do not vary directly with changes in its own costs."[19] Moreover, by making the rates symmetrical, the Commission noted that it would equalize bargaining strength among providers by making all carriers "pay the same rates for reciprocal compensation."[20]

The Commission also addressed the parties various arguments associated with establishing a bill-and-keep regime for intercarrier compensation. As a general matter, the incumbent LECs noted that bill-and-keep arrangements were appropriate only where two conditions precedent existed: (i) balanced traffic flows and (ii) termination costs of near zero.[21] Because neither circumstance existed then (nor exists now), the incumbent LECs argued that a

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17 *Id.* The Commission was careful to note that "[a]ccess charges were developed to address a situation in which three carriers … collaborate to compete a long distance call." *Id.* at ¶ 1034.
18 *Id.* at ¶ 1085 (citation omitted).
19 *Id.* at ¶ 1086.
20 *Id.* at ¶ 1087.
21 *Id.* at ¶ 1109.

bill and keep regime would not only be unlawful, but also would send incorrect economic signals to providers. As just one of many possible examples, SBC's Pacific Bell predecessor contended expressly that bill and keep would "create market distortions and encourage arbitrage."[22] For all of these reasons, the Commission concluded that "carriers incur costs in terminating traffic that are not *de minimis*, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs."[23] The Commission similarly note that "bill-and-keep arrangements are not economically efficient because they distort carriers' incentives, encouraging them to overuse competing carriers' termination facilities by seeking customers that primarily originate traffic."[24] Accordingly, the FCC limited the ability of state commissions to impose bill and keep for reciprocal compensation in cases where traffic imbalances exist.[25]

At bottom, consistent with the incumbent LECs' advocacy, the FCC established several basic principles for intercarrier compensation in the *Local Competition First Report and Order*. First, termination costs do not vary by jurisdiction – *i.e.*, it costs the same to terminate any type of traffic. Second, rates should be symmetrical based on the relevant incumbent LECs forward-looking cost of terminating traffic. Third, bill and keep only is appropriate in cases where traffic exchange is roughly balanced because the cost of providing termination is not *de minimis*. (The Commission correctly concluded that, under such circumstances, existing carriers should be free to negotiate bill-and-keep terms.) None of these principles or related FCC rules were disrupted in the subsequent litigation that ensued of the *Local Competition First Report and Order*, and these principles should serve as bedrock for this proceeding.

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22 *Id.* (citing Pacific Bell comments in CC Docket No. 95-185 at 11, 60).
23 *Id.* at ¶ 1129.
24 *Id.*
25 *Id.*

3. The 1999 Declaratory Ruling and Bell Atlantic Tel. Cos.

Not long after the adoption the *Local Competition First Report and Order*, the FCC began chipping away at the fundamental – and lawful – principles it had established in its initial implementation proceeding. Although Bell Atlantic had specifically anticipated that competitors would target "customers whose calls are predominantly inbound, such as … internet access providers" if reciprocal compensation rates were set too high, Bell Atlantic agreed to relatively high rates but then sought to avoid "writing large checks to … new entrant[s]."[26] Indeed, instead of symmetrically reducing rates for all traffic, the incumbent LECs sought to lower (if not eliminate) the rate that competitors could charge for terminating ISP-bound traffic and at the same time to maintain high rates for the types of traffic terminated by the incumbent LECs.

As a result of an intense incumbent LEC lobbying effort, the FCC specifically reconsidered reciprocal compensation for ISP-bound traffic, holding that calls terminated to ISPs do not constitute telecommunications.[27] In reaching this result, the Commission adopted a so-called "end-to-end" analysis to move ISP-bound traffic from the intrastate jurisdiction into the interstate jurisdiction, and therefore outside of sections 251 and 252. Analogizing to voicemail calls, the Commission stated that the "communications at issue here do not terminate at the ISP's local server … but continue to the ultimate destination or destinations, specifically at an Internet

[26] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Reply Comments of Bell Atlantic at 20 (May 30, 1996).

[27] *Implementation of the Local Competition Provisions in the Telecommunications act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Declaratory Ruling*, 14 FCC Rcd. 3689, 3697 (1999) ("*Declaratory Ruling*"), *vacated*, *Bell Atlantic Tel. Cos. v. FCC,* 206 F.3d 1 (D.C. Cir. 2000).

website that is often located in another state."[28] Of course, this finding contradicted the Commission's then- and still-existing definition of termination, which involves switching traffic at the end office and delivering that traffic to the end user's premises.[29] ISPs are end users.[30]

In reaction to the *Declaratory Ruling*, Commissioner Harold Furchtgott-Roth issued a separate press release[31] stating that the *Declaratory Ruling* violated the Act and would inappropriately result in disrupting numerous state commission decisions on intercarrier compensation. In addition, Commissioner Furchtgott-Roth noted that the FCC's new reliance on a so-called "end-to-end" analysis for ISP-bound calls was inconsistent with previous Commission precedent and advocacy relied upon by U.S. Court of Appeals for the Eighth Circuit.[32]

On appeal, the U.S. Court of Appeals for the D.C. Circuit vacated and remanded the *Declaratory Ruling*.[33] First, following some of the criticisms in Commissioner Furchtgott-Roth's separate press release, the Court rejected the FCC's use of the "end-to-end" analysis, concluding that the Commission "ha[d] yet to … provide an explanation why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model … or the

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28 *Declaratory Ruling*, 14 FCC Rcd. at 3697.

29 47 C.F.R. § 51.701(d).

30 *See, e.g., Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000).

31 As a technical matter, Commissioner Furchtgott-Roth did not vote on the *Declaratory Ruling*. As noted in the press release, Commissioner Furchtgott-Roth "did not participate … in protest of this action and over the denial of his process rights within the agency." The press release went on to state that Commissioner Furchtgott-Roth's request "to postpone … [a vote on the *Declaratory Ruling*] for three weeks so that the serious ramifications of the proposed action could be discussed further" was denied.

32 *See Southwestern Bell Telephone Co. v. FCC*, 153 F.3 523, 542 (1998).

33 *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

long distance call model."[34] The Court went on to note that ISP-bound calls are "switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'"[35] Indeed, on this basis, the Court noted that an ISP is "no different from many business, such as 'pizza delivery firms,'" which receive disproportionately in-bound calls as part of their business.[36]

Separately, the Court rejected the FCC's effort to classify ISP-bound traffic as "interstate access" on grounds that no such category exists in the statute.[37] For purposes of the remand, the Court directed the FCC to explain, among other things, "why [ISP-bound] traffic is 'exchange access' rather than 'telephone exchange service,'"[38] since that was the dichotomy previously established by the FCC.

4. The 2001 ISP Remand Order and WorldCom

Following the D.C. Circuit's decision in *Bell Atlantic*, the Commission released the *ISP Remand Order* in April 2001.[39] Although designed to address the remand, the FCC never answered the questions posed by the *Bell Atlantic* Court. Instead, the FCC shifted course and found for the first time that ISP-bound traffic is interstate "information access" traffic pursuant to section 251(g) of the Act, and accordingly subject to the Commission's jurisdiction under section 201 of the Act. After asserting jurisdiction pursuant to sections 201 and 251(g), the Commission preempted state commissions from regulating ISP-bound traffic, and established

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34 *Id.* at 5.
35 *Id.* at 6.
36 *Id.* at 7.
37 *Id.* at 9.
38 *Id.*
39 *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9161-62, ¶¶ 18-20 (2001) ("*ISP Remand Order*"), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003).

an "interim regime" that, among other things, set forth a rate cap, a growth cap, a rule precluding carriers from obtaining any compensation in "new market," and a presumptive test for identifying ISP-bound traffic.[40]

At the same time the Commission hindered the ability of competitors to recover part of their network costs through terminating compensation, the Commission expressly recognized that the cost of terminating an ISP-bound call is no different than that of any other type of call. Specifically, the Commission concluded that "a [local exchange carrier] generally will incur the same costs when delivering a call to a local end user as it does delivering a call to an ISP."[41] Indeed, the Commission went so far as to state that "the record developed in response to the Intercarrier Compensation NPRM and the Public Notice fail[ed] to establish any inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP."[42] In spite of these findings of fact, the Commission again broke with the key principles established in the *Local Competition First Report and Order* for the purpose of greatly limiting intercarrier compensation for ISP-bound traffic (focused on by competitive carriers) while preserving significantly high intercarrier compensation rates for voice traffic (focused on by incumbent carriers).

In a lengthy and detailed dissent, Commissioner Furchtgott-Roth again criticized the Commission for failing to follow Congress' directives as set forth in the Act. The *ISP Remand Order*, Commissioner Furchtgott-Roth stated, "is the product of a flawed

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40 *See ISP Remand Order* at 9187-89.
41 *Id.* at 9194.
42 *Id.*

decisionmaking process that occurs all too frequently in [the] agency."[43] Rather than follow the statute, "the Commission settles on a desired outcome based on what it thinks is good 'policy' and without giving a thought to whether that outcome is legally supportable."[44] Next, the Commission "slaps together a statutory analysis" and "[t]he result is an order like [the *ISP Remand Order*], inconsistent with the Commission's precedent and fraught with legal difficulties."[45]

As for the future of the *ISP Remand Order*, Commissioner Furchtgott-Roth predicted as follows:

> The result will be another round of litigation, and, in all likelihood, this issue will be back at the agency in another couple of years. In the meantime, the uncertainty that has clouded the issue of compensation for ISP-bound traffic for the last five years will continue. The Commission would act far more responsibly if it simply recognized that ISP-bound traffic comes within section 251(b)(5). To be sure, this conclusion would mean that the Commission could not impose on these communications any rule that it makes up, as the agency believes it is permitted to do so under section 201(b). Rather the Commission would be forced to work within the confines of sections 251(b)(5) and 252(d)(2), which, among other things, grant authority to the State commissions to decide on "just and reasonable" rates for reciprocal compensation.[46]

At bottom, Commissioner Furchtgott-Roth recognized that only by following the statutory scheme is it possible for the Commission to avoid the regulatory uncertainty the inevitably results from outcome-oriented decisions.

Further litigation indeed ensued. In the subsequent *WorldCom* case, the D.C. Circuit remanded (but did not vacate) the *ISP Remand Order* back to the Commission for a third

43 *Id.* at 9215 (Dissenting Statement of Commissioner Furchtgott-Roth).
44 *Id.*
45 *Id.*
46 *Id.* at 9215-16.

attempt to adopt intercarrier compensation rules consistent with the Act. The *WorldCom* court rejected outright the Commission's effort to classify ISP-bound traffic as "information access" under section 251(g). The Court noted that 251(g) "does not provide a basis for the Commission's action"[47] and that adoption of the Commission's construction of 251(g) would enable the FCC to "override virtually any provision of the 1996 Act."[48] Litigation arising under the *ISP Remand Order* continues to this day, and to date, the Commission has not responded to the *WorldCom* remand.

5. Lessons Learned

This proceeding provides an opportunity for the Commission to shift course and leave the past, piecemeal "policy" behind. The original intercarrier compensation rules promulgated by the Commission in response to the 1996 Act followed from reasonable statutory interpretation and were thus sustained. Subsequent to the implementation of the initial rules, efforts to change those rules to benefit certain industry segments have been found to violate various provisions of the Act and past Commission precedent. Principled decisionmaking is an absolute prerequisite to creating judicially sustainable rules that minimize regulatory and other forms of legal uncertainty.

In its FNPRM, the Commission described existing intercarrier compensation difficulties as emanating largely from the disparate jurisdictional classifications and rates levels for providing essentially similar functionality – *i.e.*, traffic termination.[49] "[E]xisting compensation regimes," the FCC stated, "are based on jurisdictional and regulatory distinctions

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47 *WorldCom*, 288 F.3d at 434.
48 *Id.* at 433.
49 *See, e.g.*, FNPRM at ¶¶ 15-17.

that are not tied to economic or technical differences between services."[50] Indeed, one group of participants, the Intercarrier Compensation Forum ("ICF"), has identified no fewer than ten (10) different possible classifications for traffic termination. Regulatory arbitrage arises from enabling carriers to collect and pay materially different rates for the same functionality.[51] In such a system, carriers are incented to arbitrage the rules to collect high rates for themselves but pay low rates to others. The introduction of new distinctions relating to so-called VoIP traffic create a multitude of new distinctions. Unification should avoid and not exacerbate this problem.

The current patchwork system of jurisdictional classifications "require[s] carriers to treat identical uses of the network differently, even though such disparate treatment usually has no economic or technical basis."[52] This statement by the Commission in the FNPRM was not surprising, as the FCC repeatedly has held that the cost of terminating any type of traffic is the same regardless of the jurisdictional nature of the call. As noted at the outset of this section, as early as 1996, the FCC recognized that "transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions" and "that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge."[53] In 2001, the FCC similarly concluded that "a LEC generally will incur the same costs when delivering a call to a local end user as it does delivering a call to an ISP."[54] Indeed, the FCC continued, "the record developed in response to the Intercarrier Compensation NPRM and the Public Notice fail[ed] to establish any

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50 *Id.* at ¶ 15.

51 *Id.*

52 *Id.*

53 *Local Competition First Report and Order*, 11 FCC Rcd. at 16012, ¶1033 (1996) (subsequent history omitted).

54 *ISP Remand Order*, 16 FCC Rcd at 9194, ¶ 90.

inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP."[55] More recently, the FCC noted that "similar rates should apply to both local voice traffic and ISP-bound traffic" because no cost differences exist.[56]

The Joint Commenters support the Commission's effort to unify the disparate intercarrier compensation regimes. That said, however, any such effort must follow from the Act and sound policy principles that treat carriers fairly. Otherwise, regulatory uncertainty will continue to mire the industry in litigation, dampening the ability of carriers like KMC and Xspedius to deploy additional advanced communications infrastructure. As demonstrated below, however, the Joint Commenters believe that the principles articulated by the Commission for this proceeding are reasonable, and faithful implementation of those principles should lead to a judicially sustainable, unified intercarrier compensation regime that treats all carriers fairly.

B. The Joint Commenters Support The Principles Articulated By The Commission In Its Press Release and FNPRM

In its February 10, 2005 press release announcing the adoption of the FNPRM, the FCC stated that any intercarrier compensation reform should:

- Encourage the development of efficient competition and the efficient use of and investment in telecommunications networks;

- Preserve universal service support, which ensures affordable rates for consumers living in rural and high-cost areas;

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[55] *Id.*

[56] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the* ISP Remand Order, Order 19 FCC Rcd 20179, ¶ 24 (rel. Oct. 18, 2004). Substantial questions exist as to whether the forbearance petition at issue in *Core* was granted in its entirety by operation of law due to the Commission's failure to resolve the petition within the statutory deadline set forth in the Act. Be that as it may, the Commission nonetheless reiterated its previous statements that terminating voice traffic and ISP-bound traffic is the same from a cost perspective.

- Create a technologically and competitively neutral system that can accommodate continuing change in the marketplace, provide regulatory certainty and not impede novel technology; and

- Require minimal regulatory intervention and enforcement.[57]

As noted above, the Joint Commenters support these Commission principles, and the Commission's effort to implement these principles consistent with the Act, as do a number of other service providers. The Commission must respect the plain fact that existing jurisdictional and service restrictions presently constrain the Commission's ability to achieve its goal of complete unification of intercarrier compensation rates. As described below, however, existing jurisdictional issues that arise from the Act best can be addressed by a combination of cooperation with the state commissions, and if necessary, possibly through forbearance and preemption. At the same time, existing intercarrier compensation regulations that result from policy decisions easily may be modified by the Commission.

1. The Commission's Overarching Goals Have Broad Industry Support

In an industry where large groups of industry representatives agree on precious little, the Commission should be heartened by the fact that virtually all parties agree that a unified approach to intercarrier compensation is needed and that such an approach should "encourage the efficient use of, and investment in, telecommunications networks, and the development of efficient competition."[58]

At the outset, the Joint Commenters commend NARUC for submitting a set of principles that favors the application of a unified regime to all traffic, including intrastate access,

[57] *FCC Acts to Eliminate Outmoded Intercarrier Compensation Rules*, News Release (Feb. 10, 2005).

[58] FNPRM ¶ 31.

that companies exchange over the PSTN.[59] According to NARUC's principles, carriers should have the ability to recover the cost of services requested by another carrier (*e.g.*, terminating access service) provided that those charges do not discriminate based on the classification of the requesting carrier or its customers, the location of those customers, or the network architecture of the requesting carrier's network. The value of NARUC's commitment to intercarrier compensation reform cannot be overstated. Through cooperation with NARUC, the Commission and other industry stakeholders should be able to come to consensus on the best means of unifying intercarrier compensation rates across the federal/state jurisdictional framework set forth in the Act.

Essentially all parties agree that intercarrier compensation reform should encourage investment in facilities and should be technologically and competitively neutral. In its principles, NARUC states that "intercarrier compensation charges should be competitively and technologically neutral and reflect underlying economic costs.[60] In addition, NARUC agrees that any revised system "should encourage competition by ensuring that requested carriers have an economic incentive to interconnect, to carry … traffic, and to provide high-quality service to requesting carriers."[61] CTIA similarly states that intercarrier compensation reform "should

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59 The National Association of Regulatory Utility Commissioners Study Committee on Intercarrier Compensation – Goals for a New Intercarrier Compensation System (May 5, 2004) ("NARUC Principles"). This document is available on NARUC's web site at http://www.naruc.org/associations/1773/files/intercarriercompgoals_whitepaper04.pdf (visited May 10, 2005). Just last week, NARUC submitted a revised draft plan that appears to remain a work in progress. The Joint Commenters have participated in recent NARUC workshops charged with developing a comprehensive NARUC plan, and the Joint Commenters look forward to NARUC's ultimate submission.

60 NARUC Principles at 2.

61 *Id.* at 2.

encourage economic efficiency and promote competition."[62] Moreover, CTIA notes that intercarrier compensation rules "[s]hould be technology neutral, and should not confer a competitive disadvantage on one category or carrier or a service provider over another."[63] Western Wireless agrees that reform should follow a course of "competitive and technological neutrality" and "encourage economic efficiency and promote competition."[64] The Cost-Based Intercarrier Compensation Coalition ("CBICC") similarly supports the dual goals of eliminating "improper arbitrage incentives and opportunities" and "unequal treatment of call types and different carrier types."[65]

The Joint Commenters also support the intercarrier compensation reform goals cited by the Commission. Any new approach to intercarrier compensation absolutely should promote economic efficiency and should encourage the efficient use of, and investment in, telecommunications networks, and the development of efficient competition. Reform also must respect and promote facilities-based competition in the marketplace and be competitively and technologically neutral.

Finally, a reformed system should mandate default rules that establish similar rates for similar functions and apply rates in a uniform manner for all traffic. To the extent any rate distinctions are maintained, those should be based on legitimate economic or technical differences, not artificial regulatory distinctions or subjective notions of inefficiency. Of course, the devil lies in the details. But so long as parties agree on overarching principles, constrained by

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62 CTIA Ex Parte, CC Docket No. 01-92, at 2 (Nov. 29, 2004). ("CTIA")
63 *Id.* at 2.
64 Western Wireless at Ex Parte, CC Docket No. 01-92 at 2 (Dec. 1, 2004) ("Western Wireless") (supporting CTIA principles).
65 CBICC Ex Parte, CC Docket No. 01-92, at 2 (Sept. 2, 2004) ("CBICC").

the underlying statute, the Joint Commenters submit that a reasonable industry solution that greatly improves upon the current system will result.

2. Differences among industry segments are most apparent regarding an appropriate unified rate level and universal service support

Although virtually all parties agree that rates should be unified, a split exists between those that believe rate changes should be unified at a rate of zero for all traffic (*i.e.*, "bill and keep) and others that believe a positive compensation rate should exist for intercarrier compensation. A split similarly exists regarding universal service, with some carriers arguing for a single USF mechanism that is portable to all carriers and guarantees no carrier protection from revenue loss and others advocating for use of USF as a revenue assurance device specific to certain carriers.

i. A positive compensation rate that allows for reasonable network cost recovery is necessary

Groups largely supported by carriers that originate more traffic than they terminate support bill and keep, even though the plain terms of the Act require compensation for costs put on one network provider by another.[66] CTIA, the ICF, and Western Wireless recommend moving to bill and keep over various time frames. CTIA submits that "[e]ach carrier should be responsible for recovering its network costs from its own end users and in a competitive market should have flexibility in how those costs are recovered."[67] Western

[66] *See, e.g.*, 47 U.S.C. §§ 251(b)(5), 252(a), 252(b), 252(d)(2).
[67] CTIA at 2.

Wireless agrees and argues that "carrier self-reliance" in a bill-keep system will "facilitate full intermodal competition."[68]

By contrast, CBICC, NARUC, and the National Association of State Utility Consumer Advocates ("NASUCA"), and several of the various rural groups, among others, support a system with a positive compensation structure. From a statutory perspective, although carriers voluntarily may agree to bill and keep, CBICC correctly points out that mandated bill and keep is unlawful "under [s]ection 252 [of the Act] when traffic is out of balance because" such a regime would preclude "'mutual recovery of costs.'"[69] In addition, for interstate traffic, a "rate of zero is not a just and reasonable rate under [s]ection 201."[70] As a policy matter, NARUC indicates that intercarrier compensation "should be designed to recover an appropriate portion of the requested carrier's applicable network cost."[71] Barring such cost recovery would discourage rather than encourage carriers "to interconnect, to carry traffic, and to provide high quality service to requesting carriers."[72] NASUCA adds that "any plan for [intercarrier compensation reform] must recognize that a carrier that originates, transits or terminates traffic on the network of another carrier imposes costs on that carrier."[73]

The Joint Commenters firmly believe that as a statutory and a policy matter, carriers must bear the cost of putting traffic on other carriers' networks, and as described above, any mandatory bill-and-keep scheme would violate the Act, the Commission's rules, and sound

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68 Western Wireless at 6.
69 CBICC at 1.
70 *Id.*
71 NARUC Principles at 2.
72 *Id.* at 2.
73 NASUCA Ex Parte, CC Docket No. 01-92, at 1.

policy. As a legal matter, the relevant incumbent LEC's TELRIC cost of providing transport and termination is a reasonable minimum for all carriers. This is especially true for termination.[74]

Section 201(a) obligates all common carriers providing interstate telecommunication service to interconnect and establish through routes.[75] Sections 251(a) and (b)(5) of the Act obligates all local exchange carriers, including KMC and Xspedius, to interconnect with one another and establishes a duty on all local exchange carriers to enter into reciprocal arrangements with others for the transport and termination of telecommunications.[76] Following from these and other statutory provisions, the Commission's rules state that "[a] LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network."[77] As a practical matter, and to reiterate the point made by NARUC, if carriers are expected to interconnect and provide network access for free, they will have no incentive to perform these services particularly well. This is especially true of wholesale service providers. Indeed, such a coerced outcome would serve only to weaken rather than strengthen the interoperability and connectivity of the various telecommunications networks across the country.

Throughout the FNPRM, the Commission suggests that termination rates should be flat-rated, rather than based on MOUs; however, Commission fails to describe how one could

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74 In cases where an end-user is not presubscribed to an interexchange carrier, eliminating origination charges would be appropriate. When an IXC's presubscribed long distance customer makes a call that utilizes presubscription, the IXC in effect is placing a cost on the originating carrier's network. That said, an IXC should not be held hostage to origination charges that it perceives as excessive, and for this reason forbearance from the IXC rate integration/averaging requirements contained in section 254 of the Act may be appropriate.

75 47 U.S.C. § 201(a)

76 *Id.* at §§ 251(a) and (b)(5).

77 47 C.F.R. 51.703(b).

create a meaningful flat-rated termination rate. The existence of an MOU-based intercarrier compensation rates is not part of the problem. Indeed, the Commission has repeatedly endorsed usage-based rates for switching and termination. For example, for over 20 years access charges have been usage sensitive. Moreover, the Commission endorsed usage-based rates for switching both as an unbundled network element (*i.e.*, UNE-P) and for reciprocal compensation in virtually every section 271 application filed by the Bell Operating Companies. The problem is not whether a usage-based rate is appropriate, but rather what the usage-based rate should be. The Joint Commenters agree that the incumbent LEC TELRIC's rate is a reasonable minimum termination rate.

ii. Universal service must be explicit, portable, and offer no revenue guarantees

As for universal service, new entrants generally support universal service mechanisms that are simple to administer, portable, and that guarantee no individual carrier level of funding. Western Wireless, for example, states that universal service must be "explicit, sufficient, competitively-neutral, and 'unified.'"[78] More specifically, Western Wireless seeks to "[r]eplace all existing USF mechanisms with a unified high-cost universal service mechanism that would be fully portable to all designated ETCs operating in a geographic area, and that would calculate support for all eligible carriers based on the forward-looking economic costs of providing the supported universal service in an area using the least-cost technology."[79] CTIA similarly "supports the creation of a single, unified high-cost universal service support

[78] Outline of Western Wireless Intercarrier Compensation Plan, Ex Parte, CC Docket No. 01-92, at 1 (Oct. 18, 2004).
[79] *Id.* at 2.

mechanism that calculates support based on the forward-looking economic cost of service customers in a particular geographic area."[80]

On the other hand, ICF, CBICC, and the various rural groups (*e.g.*, Expanded Portland Group ("EPG")) advocate in favor of universal service mechanisms designed largely to make up for decreases in intercarrier compensation payments. These various mechanisms are designed with specific rural LECs in mind, and funding is not portable to others. ICF, for example, seeks to establish a Transitional Network Recovery Mechanism ("TNRM") that by its terms only is available to carrier that "lose access revenues as a result of the [implementing the ICF] plan."[81] CBICC similarly seeks to allow rural LECs to recovery access revenue losses from universal service mechanisms, to the extent such losses exceed federal Subscriber Line Charge ("SLC") increases.[82] For one, EPG proposes an Access Restructure Charge ("ARC") that would be implemented to make up any revenue shortfall of intrastate access charges.[83]

The Joint Commenters submit that any new universal service reform must be done in a way that supports high-cost areas through vehicles that are consistent with the Act. The most straightforward means of doing so is by endorsing a single, explicit high-cost universal service mechanism based on the forward-looking cost of providing service using efficient technology. Only by limiting funding to forward-looking economic costs will the Commission have any hopes of ensuring that USF support grows no more quickly than the reasonable need for affordable telephone service. Moreover, to encourage the deployment of new technologies and services, USF support must be portable across carriers. Otherwise, new facilities-based

80 CTIA at 3.
81 ICF Ex Parte, CC Docket No. 01-92, at 4 (Aug. 16, 2004).
82 CBICC at 2.
83 FNPRM ¶46

investment will be discouraged in rural areas, and consumers in high-cost areas will have little hope of benefiting from the dynamic changes that continue to take place in communications.

3. Jurisdictional and service specific intercarrier compensation issues

As noted above, jurisdictional issues associated with intercarrier compensation have resulted in regulatory arbitrage, whereby carriers find themselves faced with great rate disparities for a function that has the same cost basis regardless of jurisdictional classification or geographic locale. If a picture tells a thousand words, then one need look no further than the now-famous chart provided by the ICF, which identifies no fewer than ten (10) different intercarrier compensation rates for various forms of traffic – rates that vary not by economic function performed, but rather by virtue of arbitrary jurisdictional and/or service rules.

Although there can be absolutely no doubt that today's intercarrier compensation system is composed of a hodgepodge of different arbitrary rules for the identical functionality, the Commission must tread carefully in its reform effort. To again hearken the past, Commissioner Furchtgott-Roth in his 2001 dissent described the jurisdictional morass provided for in the Communications Act as follows:

> Reciprocal compensation is an obscure and tedious topic. It is not, however, a topic that Congress overlooked. To the contrary, in describing reciprocal compensation arrangements in sections 251 and 252, Congress went into greater detail than it did for almost any other commercial relationship between carriers covered in the 1996 Act. Among other things, Congress mandated that reciprocal compensation would be: (1) made by contract; (2) under State supervision; (3) at rates to be negotiated or arbitrated; and (4) would utilize bill-and-keep only on a case-by-case basis under specific statutory conditions. See 47 U.S.C. §§ 251(b)(5), 252(a), 252(b), 252(d)(2).[84]

[84] *ISP Remand Order* at 9214 (Dissenting Statement of Commissioner Harold Furchtgott-Roth).

Put another way, even to the extent the parties agree on unification principles, cooperation between the Commission and the state commissions will be an important predicate to any ultimate solution. Of course, Congress provided the Commission with certain blunt tools that may be utilized, including state preemption under section 253[85] and forbearance under section 10,[86] however, a cooperative federal-state solution would benefit all parties, including the Commission.

The Joint Commenters do recognize that the jurisdictional scheme largely codified by Congress has resulted in a "tyranny of geography" (or perceived geography) whereby carriers are required for jurisdictional purposes to treat identical uses of the network differently, even though such disparate treatment has no economic or technical basis. Technological alternatives to traditional telephony services, such as wireless and VoIP services, are not tied to a geographic location, and accordingly make regulatory distinctions based on jurisdiction meaningless. As the Commission noted in the FNPRM, number portability and other means of encouraging intermodal competition complicates geographic analysis.[87] In a world of intermodal competition, however, why should an interstate, intraMTA call from a wireless network to a wireline network cost any different than an interstate, interLATA call between two wireline networks? No particular economic or social purpose is served by such a distinction. That said, all parties wish

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85 47 U.S.C. § 253.

86 *Id.* at § 160.

87 Indeed, carriers rarely if ever use actual geographic end points for call rating. The standard industry practice is to rate calls based on telephone numbers. As the Commission has found (and supported), carriers typically compare the telephone numbers of the calling and called party to determine the geographic end points of a call. *See Starpower Communications, LLC v. Verizon South Inc*., EB-00-MD-19, Memorandum Opinion and Order, 18 FCC Rcd 23625, 23633, ¶ 17 (2003); *see also* FNPRM at ¶ 22 n.59.

to implement that statutory scheme established by Congress in a faithful way, and doing so requires cooperation and caution if past mistakes are to be avoided.

To the extent that the Commission can work jointly with states to unify rates under the disparate jurisdictional regimes established in the Act, the Commission will succeed in rendering moot many of the thorny issues of jurisdictional classification that exist today. If all carriers receive the same rate for terminating traffic, it simply won't matter whether that traffic is categorized as "interstate," "intrastate," "ISP," "local," "long distance," "toll," "interLATA," "intraLATA," "CMRS," "interMTA," intraMTA," "FX," "V-FX," "VNXX," or something else.[88] Regardless of how traffic is classified today, the terminating carrier is providing the same functionality and should be compensated accordingly.

In the FNPRM, the Commission expressed concern that "reciprocal compensation rates often substantially exceed the per-minute incremental cost of terminating a call and therefore create a potential windfall for carriers that serve customers that primarily or exclusively receive traffic," and the Commission points to ISP-bound traffic as an example.[89] These statements run counter to any reasonable economic analysis. No party has ever credibly asserted that the mere presence of competitors somehow has increased the demand for dial-up Internet services (which actually are on the decline),[90] or any other service. As a fundamental matter of economics, however supply does not create its own demand. Rather, supply meets demand.

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[88] The Joint Commenters lists these terms to give a flavor of the complexity that exists in the current system, or set of systems, and the related advocacy positions of various parties. These terms are not exhaustive, many of them overlap with one another, and some never have been recognized by any body of competent jurisdiction.

[89] FNPRM at ¶ 23, n.67.

[90] *See, e.g.,* Sprint Ex Parte, CC Docket No. 99-68 (Sept. 22, 2004) (providing data showing a decline in overall dial-up Internet traffic in 2003).

A common sense example exposes the FNPRM's "windfall" claim as patently incorrect. The Commission's current rules set the compensation rate for ISP-bound traffic at no greater than $0.0007, a rate substantially below any state commission set TELRIC rate. The BOCs, however, consistently argue that their internal cost of providing any service – including termination – exceeds the TELRIC rate.[91] How competitors could be receiving a "windfall" when they are forced by Commission mandate to accept a compensation rate three or four hundred percent lower than the BOCs' TELRIC switching rate defies credibility. To the extent any windfall is being had, it is by the rural LECs and the BOCs that disproportionately receive the higher interstate and intrastate access rates and below-cost termination on competitive networks.

IV. OF THE PLANS PRESENTED, CBICC IS MOST CONSISTENT WITH THE COMMISSION'S INTERCARRIER COMPENSATION REFORM GOALS

In the FNPRM, the Commission asks parties to comment on "whether it is preferable for the Commission to adopt a single proposal in its entirety, rather than adopting a modified version of any particular proposal or attempting to combine different components from individual plans."[92] As described below, although the Joint Commenters laude the efforts of various groups that have developed and submitted plans, none of the plans completely satisfies the Act or the principles established by the Commission. That said, CBICC best satisfies the Act and comes closest to satisfying the Commission's goals. Accordingly, the Commission should

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91 *See, e.g.*, *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers,* WCB Docket No. 03-173, Comments of Verizon at 3 (Dec. 16, 2003) (asserting that "TELRIC rules have produced prices that fail to compensate incumbents fairly for the use of their networks").

92 FNRPM at ¶ 62.

look to CBICC or to combining components from individual plans, supplemented by the comments of others and the Commission's own analysis, to form a workable industry-wide solution that is consistent with the Act and the principles articulated in the FNPRM.

A. CBICC Is Most Consistent With the Commission's Reform Principles And The Act

CBICC is composed of a number of independent competitive LECs, including PacWest and US LEC. CBICC proposes a cost-based termination rate in each geographic area for all types of traffic. Effectively, the existing regime would remain in place, but all origination and termination functions would move to TELRIC. Although, as drafted, CBICC principles maintain originating access charges, at least one major member of the group, PacWest, appears to have suggested that originating access should be eliminated, at least when no prescribed long distance carrier exists.

In any event, the CBICC proposal calls for the Commission to require that carriers adopt a single termination rate in each geographic area that would apply to all types of traffic,[93] which is consistent with the Commission's overarching goal. Based on an analysis of recent TELRIC rates, CBICC submits that "the national average of TELRIC rates for transport and termination of calls is $0.00212,"[94] which corresponds almost exactly to the $0.002 rate proposed by NARUC. Under the CBICC plan, interstate access rates immediately would be reduced to this TELRIC level, which would vary according to the TELRIC rates set by each state according to FCC standards. The question of transitioning intrastate rates would be referred to a Joint Board.

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93 *Id.* at ¶51.

94 CBICC Proposal at 3.

As for revenue shortfalls, CBICC proposes that any lost revenue associated with access charge reductions should be offset by capped increases in end-user charges of $0.50 per year. To the extent additional revenue shortfalls exist, CBICC would enable rural carriers to supplement increased end user charges with USF funds. CBICC proposes no change in network interconnection rules, and under this plan the carrier with the retail relationship with the originating caller pays all other carriers whose networks are used to complete a call.

The CBICC proposal also covers VoIP traffic to the extent that it originates or terminates as circuit-switched traffic. Because CBICC advocates use of the TELRIC cost methodology, the Commission has characterized CBICC as supporting an average, rather than incremental, cost approach.[95] Since the U.S. Supreme Court has upheld TELRIC as a reasonable cost-based methodology, however, there is little doubt that a plan based on TELRIC would survive judicial review.

CBICC falls short of the Commission's goals in at least two ways. First, CBICC relies on individual state TELRIC rates, rather than single national rate. Accordingly, carrier behavior should be expected to maximize any wide swings that may exist between or among states. That said, practical experience with TELRIC proceedings suggests that rates for termination vary very little based on geography. So this is not a material concern, especially since the average TELRIC rate level is essentially identical to the termination rate advocated by NARUC. Second, CBICC's USF mechanism is earmarked for incumbent LECs based on revenue losses. In addition, CBICC appears neither to identify the source of additional USF

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95 FNPRM at ¶ 51, n.173.

funding, nor to recommend any means of broadening the existing base source of USF. USF must be portable and constrained, rather than a revenue assurance mechanism.

B. ICF Suffers From Material Legal And Policy Shortcomings

ICF represents a group of nine carriers, including AT&T, Iowa Telephone, Level 3, GCI, Global Crossing, MCI, SBC, Sprint, and Valor. Their plan would reduce most per-minute termination rates from existing levels to zero over a six-year period. The plan is divided into three sections: Network Interconnection, Rate Restructuring, and Universal Service. Each segment of the plan suffers from material shortcomings that make it inconsistent with the Act and the Commission's principles. Although the ICF goes into great detail regarding the practical workings of its plan, ICF (by design) offers little if any discussion of how its plan jibes with the Act, the Commission's rules, and the policy goals articulated by the Commission. As demonstrated below, ICF would defeat rather than support the Act and the Commission's policy objectives.

1. Network interconnection shortcomings

ICF radically alters the Commission's interconnection rules and regulations, which have been substantially stable over the nine years since the passage of the Act. Rather than treat carriers as equal "co-carriers," ICF classifies networks into three categories: (i) Hierarchical (tandems and end offices; BOCs); (ii) Rural Networks (RLECs, "Covered Rural Telephone Companies," or "CRTCs"); and (iii) Non-Hierarchical Networks (competitive LECs, wireless providers, and others). Thus, far from being "technology neutral" and "carrier neutral," ICF sets up a deliberate framework to discriminate against carriers based on their historical position.

The ICF sets forth the general principle that each carrier is responsible for delivering its originating traffic to the terminating carriers "edge"[96] that serves the ultimate end user. Although this general principle is eminently reasonable, the exceptions established by ICF swallow the rule whole. Indeed, this parity rule applies primarily to BOC-to-BOC interconnection, and any similar interconnection that satisfies ICF's "Hierarchical-to-Hierarchical" network interconnection. Of course, given deployment of modern infrastructure, which is not hierarchical, the ICF interconnection rule merely would serve to establish a superior position for incumbent LECs.

For "Hierarchical-to-Non-Hierarchical" interconnection (*e.g.*, BOC interconnection with competitive LECs, wireless carriers, etc.), however, the Non-Hierarchical (*e.g.*, competitive LEC or wireless provider) carrier is responsible for the transport **to** and **from** the Hierarchical network. For the first 40 miles, however, the Hierarchical (*e.g.*, BOC) network must offer transport at 50% off of special access rates. Under this scenario, competitive networks are given second class interconnection status that devalues their existing network investment, deters future investment, and moves down a path that ultimately could result in competitors being treated as end users of incumbent LEC networks, rather than co-equal carriers as required by the Act, the Commission's rules, and nine years of interconnection precedent.[97]

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[96] Under the ICF, an "Edge" effectively is a point of presence in an area. ICF requires carriers to have at least one edge per LATA, at which it will permit interconnection and receive (or accept financial responsibility for) traffic. A carrier can have no more edges in a LATA than the total number of ILEC access tandems in that LATA as of July 1, 2005. To qualify as an "edge," a device must be able to accept all types of public switched telephone network traffic, such as an access tandem, end office, wireless mobile switching center, point of presence, or trunking media gateway.

[97] The Joint Commenters explain in greater detail below the myriad reasons the ICF's network interconnection rules violate the Act, the Commission's rules, and sound policy.

As for the CRTCs, they are not required to deliver traffic to an interconnecting carrier outside of the contiguous portion of their respective territories. Rather other carriers are responsible for paying to get traffic to and from CRTCs. As a result, CRTCs are given a superior status for interconnection, whereby they are permitted to place a disproportionate share of the costs of interconnection on other carriers. This again violates the interconnection principles established in the Act, the Commission's rules, and precedent.

2. Rate restructuring shortcomings

Under ICF, rate restructuring similarly would step down in a manner that discriminates against competitors and favors incumbent LECs. More specifically, ICF would provide incumbent LECs and CRTCs with a much more generous glide path than competitors, even though by ICFs own submission competitors presently receive much low per minute intercarrier compensation rates than incumbents, even though the FCC has consistently and repeatedly found that the functionality provided has the same cost basis.

For interstate and intrastate access charges, ICF would reduce rates in four equal steps to a uniform rate of $0.000175 per minute for termination by July 1, 2009. Origination would transition to $0.00 over this same time frame. Wireless-Wireline Traffic would be set at the whopping rate of $0.0125 as of July 1, 2005, and would step down to $0.000175 as of July 1, 2008. As for CRTC's, their terminating transport could not exceed $0.0095 as of July 1, 2007.

Non-access intercarrier comp (other than CMRS-CRTC and ILEC-ILEC) – *e.g.*, local voice traffic and ISP-bound traffic – that competitors largely specialize in, would be radically reduced almost immediately. For example, the FCC's stated ISP-bound termination rate is $0.0007 – the lowest of the rate categories listed in ICF's chart of categories. Under ICF this rate (and the rate for local voice termination) would be immediately slashed to $0.0003525 as of July 1, 2005 and would ramp down to $0.000175 as of July 1, 2008. As noted above, by contrast, ICF would maintain a Wireless-to-Wireline traffic rate 40 times higher ($0.0125) for the same functionality, which will disproportionately benefit incumbent LECs.

Through access charge reform and the incumbent LEC assault on ISP-bound traffic compensation, competitors have been forced to reduce their termination rates drastically over the last several years. Reforming intercarrier compensation should not begin with reducing rates for carriers that already have been forced to absorb material rate erosion over the last several years. Rather any reasonable approach should glide the highest rates down first (*e.g.*, rural access charges) and impact other carriers only after all rates are brought to parity, at which time all providers can step down rates together, if necessary.

At the same time rates get restructured down, regulated end user charges, specifically the residential SLC, get ratcheted up from $6.50 to $10.00 over four years. This proposal yet again highlights the myriad ways that ICF unfairly favors incumbent LECs. As a practical matter, incumbents are the only carriers that provide any meaningful level of basic local exchange service to residential consumers. The one successful competitive residential entry vehicle for this type of service – UNE-P – has been eliminated. Also, under section 251(c)(4) resale, the incumbent – not the competitor, is entitled to collect access charges, including the SLC. Thus, by stepping up the SLC, the ICF provides revenue assurance for the incumbent LECs and offers nothing to competitors, other than accelerated rate reductions.

To the extent the Commission is going to permit SLC increases at all, it should do so on a nondiscriminatory basis across residential and business lines. In a competitive market, carriers ultimately may not have the ability to charge full SLCs to customers due to price pressure, but the Commission should establish ceilings for such items that all carriers can point to and rely upon in making representations to their customers.

3. Universal service shortcomings

ICF would create two new universal funds to provide explicit support for intercarrier compensation amounts not otherwise recoverable. One mechanism, the Intercarrier Compensation Recovery Mechanism ("ICRM"), is available to non-rural incumbent LECs and all competitive eligible telecommunications carriers ("CETCs") on a per-line basis in non-CRTC areas. The other mechanism, the Transitional Network Recovery Mechanism ("TNRN"), would be available only to CRTCs and certain eligible "CETCs." Under this mechanism, rate-of-return CRTCs would receive support based on their revenue requirement, without regard to the number of lines they serve.

To finance new funds, ICF proposes creation of a new contribution methodology based on "units." Essentially, each working telephone number is assessed one unit. Residential DSL, cable modem, and other high-speed connections would be assessed a single unit. For business connections, dedicated network connections would be assessed 1-100 units, depending on capacity. ICF does not specify an expected size for its new fund. Fundamentally, however, the ICF fails to make any link between the assignment of telephone numbers and use of the network. A phone number simply is not a useful proxy, and could result in situations where carriers and consumers channel their use of telephone numbers in order to limit universal service exposure.

At bottom, the Joint Competitors appreciate ICF's efforts at universal service reform, but note that they fall far short of any reasonable mark. Universal service quite simply should not be utilized as a revenue offset for any discrete, insular set of carriers. In addition, although the Joint Commenters agree that universal service needs a better funding mechanism, moving from a revenue-based system to a connection-based or telephone-number based system will not accomplish that goal. Rather, the challenge for the Commission is to control universal service expenditures and expand the base of contributors to ensure to the extent practicable the no one group of service provides bears an inequitable USF support burden.

C. Rural Plans – EPG And ARIC

Since the filing of their plans, the Expanded Portland Group ("EPG") and the Alliance for Rational Intercarrier Compensation ("ARIC"), and other rural interests have joined forces. Accordingly, it is difficult to know whether or to what extent the groups have merged their plans as well. EPG consists of over 20 RLECs and ARIC is primarily represented by Great Plains Telephone. EPG supports a two-phase plan would eventually convert per-minute intercarrier charges to capacity-based charges. ARIC's Fair Affordable Comprehensive Telecom Solution ("FACTs") plan would unify per-minute rates at a level based on a carrier's embedded costs. Although it is difficult to know whether and to what extent the groups have merged their plans, the Joint Commenters will endeavor to address some of the overarching points of the main rural plans.

EPG does not propose unifying intercarrier compensation rates. Rather EPG, through a number stages seeks to address certain reform issues that are of specific interests to its members. In stage one of its proposal, EPG seeks to resolve what it considers the more immediate issues arising under the current regimes, including unidentified or "phantom" traffic, the scope of the ESP exemption, and the termination of traffic in the absence of agreements between carriers. To address these issues, the EPG plan would implement "truth-in-labeling" guidelines, establish default termination rules and rates, and eliminate the ESP exemption for ISPs terminating traffic to the PSTN. ISPs would be permitted to continue to use flat-rated business lines to receive calls from their customers. Stage one of EPG would do nothing to further the Commission's unification goals; rather it would require carriers to expend resources pigeon-holing various traffic types into EPG's desired categories, even though the cost of originating and terminating these traffic types is identical.

In the second stage of the EPG plan, all per-minute rates would be set at the level of interstate access charges. In addition, a new Access Restructure Charge ("ARC") would be implemented to make up any revenue shortfall of intrastate access charges.[98] The EPG proposes that a national benchmark price level of $21.07 per line be established for computing the eligibility for ARC funding. Carriers with rates below the national benchmark would be subject to reduced ARC funding they otherwise would qualify for.

ARC funding support would come from a capacity-based charge calculated by National Exchange Carrier Association, and bulk-billed to all carriers based on working telephone numbers. However, funding only would be distributed to carriers that lose access charge revenue, *i.e.*, rural incumbent LECs. The EPG asserts that it is not a universal service mechanism and therefore need not be portable to wireless carriers. Exactly why ARC transfer

[98] FNPRM ¶ 46.

payments to rural LECs based on some notion of assigned telephone numbers do not constitute a universal service mechanism is curious at best.

In the final stage of the EPG plan, per-minute access charges are converted to a capacity-based "Port and Link" structure. Under the EPG plan, carriers would purchase "Ports" to provide a connection into a local carriers network and "Links" to connect the two networks.[99] Apparently, the Port and Link charges would be set to recover the average equivalent interstate per minute rate with rate banding. Initially, the EPG plan would convert only dedicated switched transport services (*i.e.*, direct interconnection) to a capacity-based structure. Port and Link charges would not apply to local traffic, including Extended Area Service (EAS), and ISP-bound traffic.

ARIC's FACTS plan is designed to unify per-minute rates for all types of traffic that would be capped at a level based on a carrier's unseparated, interoffice, embedded costs.[100] Specifically, the unified compensation rates for rate-of-return carriers would be calculated by dividing the appropriate interoffice, traffic-sensitive, unseparated, embedded costs by minutes (both access and reciprocal compensation) that utilize a company's interoffice facilities.

The rates for price cap carriers would be determined by calculating reinitiated price cap rates on an unseparated basis to be applied to all network minutes. If the existing price cap rates are higher than the reinitiated rates, the rates would be reset to the reinitiated rates; if the existing rates are lower, the price cap rates would remain in place.

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[99] *Id.* ¶ 47.
[100] *Id.* at ¶ 48.

The FACTS plan calls for local retail rate rebalancing to benchmark levels established by state commissions.[101] These benchmarks would be set within a nationwide rate range recommended by the Joint Board on Universal Service and approved by the Commission. FACTS would retain the federal SLC cap and unify SLCs among all companies on a state-specific basis. For rural carriers, these SLCs would be set at the weighted-average residential and business SLCs for price cap carriers in that state. The SLCs for price cap carriers will depend on whether there is an excess of revenues from the reinitiated access rates or current price cap rates.

Any costs still not recovered through application of these per-minute compensation rates, rebalanced local service rates, and unified SLCs would be recovered through a state equalization fund ("SEF"). SEFs would be under the control of state commissions but would be funded from both federal and state sources. SEF distributions would be available to all ETCs.[102] These changes do not constitute universal service reform. Rather, they constitute a misguided and unlawful revenue assurance plan that must be rejected.

V. THE COMMISSION SHOULD NOT DISTURB ITS EXISTING, WELL-UNDERSTOOD INTERCONNECTION RULES

In the FNPRM, the Commission requests comments on whether its interconnection rules need to or should be modified as part of intercarrier compensation reform.[103] As described below, the Joint Commenters submit that the answer to that question is a resounding "no." Furthermore, any effort to modify network interconnection rules to implement the ICF's network interconnection plan would violate the Act, well-established Commission rules, and the Commission's stated policy objectives. Moreover, as described below, the

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101 *Id.* at ¶ 49.
102 *Id.* at ¶ 50.
103 *Id.* at ¶ 92.

Commission's existing interconnection rules have the value of being lawful, well-understood, and effective. Accordingly, the Commission should move very cautiously to the extent it decides to tinker with an interconnection system that is working and has worked for over nine years.

The Commission states that issues related to the location of the point of interconnection ("POI") and the allocation of transport costs are some of the most contentious issues in interconnection proceedings.[104] "In particular," the Commission notes, "the record suggests that there are a substantial number of disputes related to how carriers should allocate interconnection costs, particularly when the physical POI is located outside the local calling area where the call originates or when carriers are indirectly interconnected."[105] Although these issues may be contentious, it is only because the incumbent LECs wish to treat as much as possible competitors as end users, rather than as co-carriers. All such efforts must be rejected as contrary to the Act and the Commission's goal of encouraging facilities investment.

The Act created a framework for the development of facilities-based competition in which incumbent LECs are required to interconnect their networks with the networks of requesting competitive carriers. In the *Local Competition First Report and Order*, the FCC required incumbent LECs to interconnect with requesting carriers at any technically feasible point, on terms and conditions that are just, reasonable, and nondiscriminatory, and at a level of quality (including installation intervals) equal to those which an incumbent LEC provides to itself in the provision of retail services.[106]

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104 *Id.* at ¶ 91.
105 *Id.*
106 *Local Competition First Report and Order*, 11 FCC Rcd. at ¶¶ 172-73.

Explaining the need for minimum, national interconnection standards, the FCC found:

> National standards will tend to offset the imbalance in bargaining power between incumbent LECs and competitors and encourage fair agreements in the marketplace between parties by setting minimum requirements that new entrants are guaranteed in arbitrations. Negotiations between an incumbent and a new entrant differ from commercial negotiations in a competitive market because **new entrants are dependent solely on the incumbent for interconnection**.[107]

On this basis, the FCC established national interconnection regulations, which have been in place nearly unchanged for almost nine years.[108]

Specific to the intercarrier compensation issues associated with network interconnection, the FCC made clear that each party bears the financial responsibility for transporting its originating traffic:

> The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility. For example, if the providing carrier provides one-way trunks that the interconnecting carrier uses exclusively for sending terminating traffic to the providing carrier, then the interconnecting carrier is to pay the providing carrier a rate that recovers the full forward-looking economic cost of those trunks. The interconnecting carrier, however, should not be required to pay the providing carrier for one-way trunks in the opposite direction, which the providing carrier owns and uses to send its own traffic to the interconnecting carrier.[109]

The FCC expressly codified this bedrock interconnection principle in rules in no fewer than two places. First, section 51.703(b) of the Commission's rules provides that "[a] LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that

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107 *Id.* at ¶ 216 (emphasis added).

108 The Eighth Circuit did overturn the FCC's so-called "superior interconnection" rule, but that rule is not implicated or remotely relied upon by any party in this proceeding.

109 *Local Competition First Report and Order*, 11 FCC Rcd. at ¶ 1062.

originates on the LEC's network."[110] Second, section 51.709(b) of the Commission's rules provides that "[t]he rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of the that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network."[111]

Further clarifying the Act and its existing rules, the Commission set forth the definitive interpretation of POI issues in its *Virginia Arbitration Order*.[112] In the *Virginia Arbitration Order*, the Commission clarified two fundamental POI principles. First, the originating carrier – the cost causer – is financially responsible for originating, transporting, and terminating its traffic. Second, individual competitive LECs have the right to select where on the ILEC network within a LATA to deliver the competitive LECs's originating traffic to the incumbent LEC. In so doing, a competitive LEC may at its discretion select a single point per LATA, so long as interconnection at that point is technically feasible. As the Commission explained:

> Under the Commission rules, competitive LECs may request interconnection at any technically feasible point. This includes the right to request a single point of interconnection in a LATA. The Commission's rules implementing the reciprocal compensation provision in section 252(d)(2)(A) prevent any LEC from assessing charges on another telecommunication scarier for telecommunication traffic that originates on the LEC's network. Furthermore, under these rules, to the extent an incumbent LEC delivers to the point of interconnection its own originating

110 47 U.S.C. § 51.703(b).

111 *Id.* at § 51.709(b).

112 *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd. 27039, ¶ 301 (2002) ("*Virginia Arbitration Order*").

> traffic that is subject to reciprocal compensation, the incumbent LEC is required to bear financial responsibility for that traffic.[113]

Although certain incumbents may not like these principles, that does not make them controversial. Rather these issues are well settled and no party has suggested why the Commission should modify these fair and well-understood principles.

Section 251(c)(2) obligates incumbents to provide competitors interconnection at any technically feasible point. The FCC has interpreted this duty to provide technically feasible interconnection very broadly. For example, the FCC has concluded that the term "technical feasibility" refers "solely to technical or operational concerns, rather than economic, space or site considerations."[114] Furthermore, the FCC requires an incumbent LEC to "accept the novel use of, and modification to, its network facilities to accommodate the interconnector…."[115] All of these requirements encourage facilities deployment.

Indeed, "to justify a refusal to provide interconnection or access at a point requested by another carrier, incumbent LECs must prove to the state commission, with clear and convincing evidence, that specific and significant adverse impacts would result from the requested interconnection or access."[116] This is significant because under the FCC's rules, "successful interconnection or access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that interconnection or access is technically feasible at that point, or at substantially similar points in networks employing substantially

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113 *Id.* at ¶ 52 (footnotes omitted).
114 *Local Competition First Report and Order*, 11 FCC Rcd. at ¶ 203.
115 *Id.* at ¶ 202.
116 *Id.* at ¶ 203.

similar facilities.…"[117] No party has suggested that this standard has been burdensome or otherwise difficult to implement. Furthermore, this standard offers the benefit of being adaptable to technological change, and this flexibility should stand to encourage network investment and maximize interoperability between networks.

Section 251(c)(2)(D) of the Act provides that an incumbent LEC shall provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."[118] The FCC has correctly concluded that the term "nondiscriminatory" requires both a comparison of how incumbent LECs treat third parties and how incumbents treats themselves:

> Because the ILECs have an incentive to discriminate in favor of themselves, "…we reject for purposes of section 251, our historical interpretation of 'nondiscriminatory,' which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term 'nondiscriminatory,' as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as itself. In any event, by providing interconnection to a competitor in a manner less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be 'just' and 'reasonable' under section 251(c)(2)(D).[119]

Further elaborating on the nondiscriminatory standard, the FCC noted that incumbent LECs must "provide interconnection to [CLECs] in a manner no less efficient than the way in which the

117 *Id.* at ¶ 204.
118 47 U.S.C. §251(c)(2)(D).
119 *Local Competition First Report and Order*, 11 FCC Rcd. at ¶ 218.

incumbent LEC provides the comparable function to its own retail operation."[120] Proposals, such as ICF, that would create tiers of interconnection responsibilities based on arcane and unsupported network classifications expressly violate 251(c)'s nondiscrimination mandate. The Commission should reject any such effort to discriminate among interconnecting carriers as contrary to the Act and sound policy.

VI. ANY PLAN ADOPTED MUST BE CONSISTENT WITH THE SECTION 252(D)(1) AND (2) COST STANDARDS

As the Commission points out, it is "mindful of [its] obligation to comply with the statutory provisions governing intercarrier compensation, such as sections 251(b)(5) and 252(d)(2) of the Act."[121] Similarly the Commission recognizes "that any unified regime requires reform of intrastate access charges, which are subject to state jurisdiction."[122] To satisfy these competing standards, Joint Commenters submit that the Commission should maintain rates no lower than the incumbent LEC's TELRIC rate for intercarrier compensation. TELRIC may not be perfect, but it offers significant benefits.

Foremost, TELRIC is consistent with the Act and indeed has been reviewed and sustained by the Supreme Court.[123] Furthermore, TELRIC satisfies both sections 252(d)(1) and 252(d)(2). In the *Local Competition First Report and Order*, the Commission concluded that "the pricing standards established by section 252(d)(1) for interconnection and unbundled elements, and by section 252(d)(2) for transport and termination of traffic are sufficiently similar

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120 *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 75, ¶ 65 (1999) (subsequent history omitted).

121 FNPRM at ¶ 63 (citing 47 U.S.C. §§ 251(b)(5), 252(d)(2)).

122 *Id.*

123 *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999).

to permit the use of the same general methodologies for establishing rates under both statutory provisions."[124] Moreover, the Commission found that the statute's "additional cost" standard "permits the use of the forward-looking, economic cost-based pricing standard that the [Commission established] for interconnection and unbundled network elements."[125]

The Commission's statement that its "subsequent experience suggests that TELRIC is not necessarily consistent with the 'additional cost' standard" is curious.[126] TELRIC rates have been relied upon by the Commission for nine years in a variety of proceedings, including section 271 proceedings in which the Commission expressly reviewed reciprocal compensation rates. Moreover, as ICF has demonstrated, TELRIC rates for reciprocal compensation are materially lower than the rates set for both interstate access and intrastate access. Although it may possibly be the case that "TELRIC measures the *average* cost of providing a function, which is not necessarily the same as the *additional* cost of providing that function,"[127] the Commission would do far better to focus on bringing clearly non-cost-based rates, such as access rates, in line with a cost-based reciprocal compensation rates than to engage in a technology-specific effort to identify what the "perfect" cost standard is. Substantial improvement should not be made the enemy of the "perfection."

The ready availability of a judicially-sustained cost standard – *i.e.*, TELRIC – should not be minimized. The Commission is dealing with myriad issues in this proceeding, and ultimately, all roads will lead back to the pricing methodology ultimately adopted by the Commission. To the extent the Commission maintains TELRIC, a substantial set of potential

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124 *Local Competition First Report and Order*, 11 FCC Rcd. at ¶ 1054.
125 *Id.*
126 FNRPM at ¶ 71.
127 *Id.*

appellate litigation issues will evaporate, greatly improving the likelihood that a newly-unified regime will survive inevitable judicial scrutiny.

The same holds true for state commission implementation. State commissions have substantial experience with TELRIC by virtue of their responsibility for setting state-specific unbundled network element ("UNE") rates. Unifying intrastate access rates to match interstate access rates and reciprocal compensation rates will be made all the easier if carriers and state commissions are working with a known cost standard and methodology, rather than if they are required to both unify the disparate regimes and implement a new cost standard that never has undergone judicial review. This again should reduce on-going implementation costs and litigation risks that will derive from putting into practice whatever regime the Commission ultimately elects.

As the Commission notes, "[e]xcept for the CBICC proposal, which supports a TELRIC cost standard," other proposals "proposal would require some departure from the Commission's implementation of the section 252(d)(2) "additional cost" standard.[128] As noted earlier, although TELRIC may not be perfect, it has the benefit of being lawful. Accordingly the Commission strongly should consider its on-going use.

VII. OTHER IMPLEMENTATION ISSUES

The Commission also seeks comment on a variety of related issues, including but not limited to, transiting, CMRS intercarrier compensation, the use of joint boards, and the use of tariffs and/or interconnection agreements. The Joint Commenters' view on each of these important issues is described below.

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[128] FNPRM at ¶ 65.

A. Transiting

The Joint Commenters agree with the Commission's assessment that "the availability of transit service is increasingly critical to establishing indirect interconnection."[129] Indeed, without "the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks."[130] Transiting obligations ensure that traffic continues to flow across multiple networks and network platforms. For these reasons, Congress codified multiple provisions in the Act that govern transit service, including sections 201(a) (which places a transiting obligation on all interstate telecommunications carriers), 251(a) (which places a transiting obligation on all local exchange carriers), and 251(c)(2)(B) (which requires incumbent LECs to offer transiting as part of providing interconnection at any technically feasible point).[131]

Section 201(a) of the Act requires all common carriers engaged in the provision of interstate telecommunication services to interconnect and to establish "through routes,"[132] a function that fundamentally encompasses transiting. In the access context, the Commission has found that carriers are obligated to purchase access services from one another so long as the rates are just and reasonable. Relying on section 201(a), the Commission has determined that common carriers "must establish a physical connection or a through route via the acceptance of

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129 *See* 47 U.S.C. § 251(a)(1).
130 FNPRM at ¶ 125.
131 47 U.S.C. §§ 201(a), 251(a)(1), and 251(c)(2).
132 *Id.* at § 201(a).

access service if such service is provided at rates that are just and reasonable and in accordance with the Act."[133]

This 2004 finding of the Commission followed from its 2001 decision that mandatory interconnection and the establishment of through routes was necessary to support "universal connectivity."[134] In the *Seventh Access Charge Order,* the Commission noted that "any solution [that would allow a common carrier] unilaterally and without restriction to refuse to terminate calls or indiscriminately to pick and choose which traffic they will deliver would result in substantial confusion for consumers [and] would fundamentally disrupt the workings of the public switched telephone network…."[135] Thus, there can be no doubt that section 201(a) requires transiting.

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[133] *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108, ¶ 61 (2004) ("*Eighth Access Charge Order*").

[134] *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) ("*Seventh Access Charge Order*").

[135] *Id.* Regarding the hearing provision of section 201(a), the Commission noted as follows:

> Although section 201(a) requires an opportunity for hearing, our previous use of notice and comment procedures to satisfy the section 201 hearing requirement was expressly confirmed by the U.S. Court of Appeals for the Third Circuit. *See Bell Telephone Co. v. FCC*, 503 F.2d 1250, 1265 (3d Cir. 1974) (holding that section 201(a) permits procedures less formal and adversarial than an evidentiary hearing because, among other things, courts have come to favor rulemaking over adjudication for the formulation of new policy), *cert. denied*, 422 U.S. 1026 (1974). In the *Access Charge Further Notice*, the Commission explicitly sought comment on an IXC's obligations to accept or deliver traffic from or to a LEC and "whether any statutory or regulatory constraints prevent an IXC from declining a CLEC's access service." *Access Charge Further Notice*, 14 FCC Rcd 14341-42, paras. 241-42. In response to the *Access Charge Further Notice*, numerous parties commented on whether section 201(a) requires IXCs to accept access traffic. *See*

Section 251(a) expressly requires all LECs to provide "indirect interconnection," which is part and parcel of transiting. Under section 251(a) of the Act, telecommunications carriers "should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices."[136] Indirect interconnection via a transit service provider is the most efficient means of interconnection and must remain available under section 251(a). Intermodal providers, such as wireless carriers, often have small amounts of traffic that go to myriad terminating end offices. Without the availability of indirect interconnection, as required under the Act, these carriers would be left to direct interconnection essentially all carriers, even in cases where traffic volumes do not justify such interconnection.

The provisions contained within section 251(c)(2) demonstrate that incumbent LECs have a transiting obligations in addition to that required of all LECs under section 251(a). Section 251(c)(2)(A) requires incumbent LECs to interconnect with requesting carriers for the "**transmission** and **routing** of telephone exchange service and exchange access," which are key elements of transiting traffic.[137] Indeed, the word routing is synonymous with transiting, as both terms contemplate use of a device (*e.g.*, tandem switch) to direct traffic towards its ultimate destination. Similarly, section 251(c)(2)(B) requires incumbents to provide interconnection at "at

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CLEC Access Reform Order, 16 FCC Rcd 9959, para. 91 (discussing the comments filed on this issue). Thus, the notice and comment procedures were satisfied in this case.

Eighth Access Change Order, 19 FCC Rcd. at ¶ 216. Accordingly the FNRPM in this proceeding similarly would satisfy section 201(a)'s hearing requirement.

[136] *Local Competition First Report and Order*, 11 FCC Rcd at 15991, ¶ 997 (defining interconnection obligations under section 251(a)).

[137] 47 U.S.C. § 251(c)(2)(A) (emphasis added).

any technically feasible point," which includes tandem switches – switches that are synonymous with transiting.[138] Interconnection at the tandem switch provides access to the full tandem switching functionality, including access to all switches interconnected with the tandem switch.

Regarding rate structure, the Joint Commenters submit that TELRIC is a cost standard that yields reasonable minimum rates. By adopting TELRIC for transiting as well as other functionalities associated with intercarrier compensation, the Commission will go a long way toward avoiding a situation where a carrier lacks "the incentive to establish direct connections even if traffic levels warrant it."[139] Simply put, once a carrier generates enough traffic to warrant direct interconnection, the carrier will have the economic incentive to do so. Importantly, however, the Commission must recognize that rate unification must transcend like functionality. Permitting a policy of establishing separate pricing methodologies for virtually identical functionality would serve only to recreate the very problems the Commission is attempting to eliminate in this proceeding.

Unification of rates, however, is the great equalizer. If rates are set to high, they will naturally be competed down. If rates are set too low traffic flows will rebalance. If the Commission sets different rates for the same functionality, regulatory arbitrage will occur, whereby carriers will have an incentive to game the system to collect high rates and pay low rates – the hallmark of the very system that exists today.

B. CMRS Issues

In the FNPRM, the Commission identifies a number of CMRS related issues, including its "intraMTA rule" (which establishes as local all CMRS calls within a Metropolitan

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138 *Id.* at § 251(c)(2)(B).
139 FNPRM at ¶ 131.

Trading Area ("MTA")), rating and routing issues, and establishment of interconnection agreements.[140] As show below, all of these issues evaporate if the Commission is able to establish a unified intercarrier compensation regime with the support of the state commissions.

In the *Local Competition First Report and Order*, the Commission stated that traffic to or from a CMRS network that originates and terminates within the same MTA is subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges.[141] The Commission reasoned that, because wireless license territories are federally authorized and vary in size, the largest FCC-authorized wireless license territory, *i.e.*, the MTA, would be the most appropriate local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5).[142] Thus, section 51.701(b)(2) of the Commission's rules defines telecommunications traffic exchanged between a LEC and a CMRS provider that is subject to reciprocal compensation as traffic "that, at the beginning of the call, originates and terminates within the same Major Trading Area."[143]

In the FNPRM, the Commission seeks comment on whether it should eliminate the intraMTA rule, which distinguishes access traffic from section 251(b)(5) CMRS traffic.[144] To the extent a unified regime is established, there would be no necessary need to eliminate the intraMTA rule, as it effectively would be mooted. Indeed, rate harmonization across jurisdictions and geography would eliminate the relevance of both with regard to intercarrier compensation flows, which would be one of the prime benefits of reform. Unification similarly

140 *See, e.g.*, FNRPM at ¶ 135.
141 *Local Competition First Report and Order*, 11 FCC Rcd at 16014, ¶ 1036.
142 *Id.*
143 47 C.F.R. § 51.701(b)(2).
144 FNRPM at ¶ 135.

would eliminate any existing need to identify the geographic end points of a wireless call. If the rate is the same regardless of geography, then the precise physical origination point and termination point just does not matter. Unification similarly would render irrelevant any distinctions related to whether a CMRS call is routed through an IXC or some other type of carrier.

The Commission correctly recognized in the FNPRM that it "is standard industry practice for telecommunications carriers to compare the NPA/NXX codes of the calling and called party to determine the proper rating of a call."[145] Throughout the industry – wireline and wireless – calls generally are rated local if the called number is assigned to a rate center within the local calling area of the originating rate center. If the called number is assigned to a rate center outside the local calling area of the originating rate center, it is rated as a toll call. There can be no doubt that in certain circumstances some companies believe that call should not be rated based upon NPA/NXX, but rather based on the physical location of the two end users. To the extent that rates are harmonized across jurisdiction, this whole debate becomes academic. Regardless as to whether a call is "access" or "non-access," "intrastate" or "interstate," "intraMTA" or "interMTA," the compensation flow and rate would be the same. In addition to making matters administratively simpler, such an outcome would have the benefit of being the correct policy result, as there is absolutely no economic basis for charging different rates for what is identical functionality.

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[145] *Id.* at ¶ 141 (*citing Starpower Communications, LLC v. Verizon South Inc*., EB-00-MD-19, Memorandum Opinion and Order, 18 FCC Rcd 23625, 23633, ¶ 17 (2003)).

C. Use Of Joint Boards

There can be no doubt that the Commission has authority under section 201 of the Act to establish intercarrier compensation schemes for interstate traffic and authority under section 252(d) to establish the methodology for state commission development of rates for non-access intrastate traffic.[146] It is less clear, however, whether and to what extent the Commission may define rates or rate structures for intrastate access traffic, which historically has been an area within the exclusive jurisdiction of state commissions. Use of a Joint Board, however, may very well provide the Commission with a vehicle for harmonizing intrastate access charges without the need to utilize more invasive tactics, such as preemption and forbearance.

As noted in the FNRPM, section 410(c) of the Act gives the Commission authority to refer to a Federal-State Joint Board "any other matter relating to common carrier communications of joint Federal-State concern."[147] Under the CBICC plan, "interstate access rates immediately would be reduced to this TELRIC level, while the question of how to transition intrastate rates would be referred to a Joint Board."[148] Through use of a Federal-State Joint Board, the Commission could encourage the sate commission's to adopt for purposes of setting intrastate access rates the same Commission-established rate standard used for reciprocal compensation under sections 251 and 252. Through use of a Joint Board, the Commission would engage the states in a cooperative effort, which should produce results that satisfy the Commission's policy goals as well as the jurisdictional and rate setting requirements of the Act.

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146 *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999) (holding that the Commission has jurisdiction to design a pricing methodology to be applied under section 252(d) of the Act).

147 *Id*.

148 FNPRM at ¶ 51.

To the extent that a Joint Board proves ineffective, the Commission then could consider other means of obtaining rate harmony, including preemption and forbearance.

At all costs, however, the Commission should avoid novel theories to bootstrap authority over intrastate access charges. As an example of approaches to be avoided, in the FNPRM the Commission suggest the possibility of invoking the "mixed use" doctrine to establish that it is impractical to separate interstate and intrastate access traffic.[149] Although the mixed use doctrine could be bolstered in some sense by the emergence of intermodal competition from wireless and nomadic VoIP services – which inherently is difficult to pigeonhole jurisdictionally, the Commission would be taking needless regulatory risk by adopting a novel theory to take authority away from the states.

Novel jurisdictional theories will produce novel judicial risk. To avoid such needless risk, the Joint Commenters submit that all parties would be better off if the Commission could work out an arrangement with the state commissions through a Joint Board. NARUC has articulated intercarrier compensation reform principles that are consistent with the Commission's goals, and NARUC has devoted substantial resources to developing a comprehensive reform plan. In the first instance, the Commission should attempt to come to a mutually agreed-upon solution with the state commissions. Only if such a pursuit first proves fruitless should the Commission consider other measures, such as preemption under section 253, 254,[150] or otherwise.

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149 *Id. at* ¶ 80.

150 *See* ICF Ex Parte, CC Docket No. 01-92, at 35 (Oct. 5, 2004) ("ICF Supporting Brief"). Supporting Brief at 35 (stating that the Commission "can and should preempt intrastate access charges on the ground that they are inconsistent with the Commission's duty under section 254 to rationalize universal service support.").

D. Use Of Tariffs And Interconnection Agreements

The Commission also seeks comment on the proper vehicle or combination of vehicles for effecting any reformed interconnection regime established by the Commission. In the FNPRM, the Commission rightly identifies two primary vehicles, names tariffs and privately negotiated agreements. The Joint Commenters note that the Commission should utilize a combination of tariffs and private contracts to cover the entire jurisdiction waterfront that exists under the Act. By taking such a tact, the Commission will minimize the litigation risk that may result from a unique or novel implementation scheme.

To remain as true to the Act as possible, the Joint Competitors submit that rates set by state commissions pursuant to section 251 and 252 should be included in interconnection agreements entered into by the parties. In cases where parties are not directly interconnected, or where access traffic is at issue, the Commission should support tariffed-based intercarrier compensation arrangements that: (i) set rates no higher than the comparable TELRIC rates and (ii) permit carriers to supercede the tariff through interconnection agreements. Finally, the Commission should make clear that any new scheme established institutes default rules, which may be modified by agreement of contracting parties, subject to other requirements of the Act (*e.g.*, filing with and approval by state commissions). Such a simple approach to implementation is faithful to the Act, and therefore should be pursued by the Commission.

VIII. THE COMMISSION SHOULD USE ITS FORBEARANCE AND PREEMPTION AUTHORITY CAUTIOUSLY, IF AT ALL

In the FNPRM, the Commission also seeks comment of use of its forbearance and preemption authority as a means of achieving its unification goals. Specifically, the Commission seeks comment on whether it should use its section 10 forbearance authority to forbear from application of section 251(b)(5)'s requirements[151] and whether it has the authority to preempt the intrastate access charge regime that presently exists.[152] The Joint Commenters submit that the Commission should avoid to the extent possible efforts to utilize its forbearance and preemption powers as it moves to unify the existing disparate intercarrier compensation regimes. Indeed, as the Commission outlined in the FNPRM, serious legal questions exist regarding whether the Commission may forbear from section 251(b)(5) or utilize preemption to harmonize intrastate access charges with other jurisdictional forms of intercarrier compensation.

A. The Commission's Ability To Forbear From Section 251(b)(5) Is Unclear

Under the Act, the Commission has authority to forbear from applying any regulation or provision of the Act to a telecommunications carrier or telecommunications service, or class of carriers or services, in any or some of its or their geographic markets, if it determines that:

- enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

- enforcement of such regulation or provision is not necessary for the protection of consumers; and

- forbearance from applying such provision or regulation is consistent with the public interest.[153]

Although the Commission has significant forbearance authority, it is not without limit. Specific to the test referenced above, the Commission would have a difficult time

[151] FNRPM at ¶¶ 74-76.
[152] *Id.* at ¶ 82.
[153] 47 U.S.C. § 160(a).

demonstrating that on-going application of section 251(b)(5) was not necessary to ensure that the "charges, practices, classifications, or regulations" remain "just and reasonable."

Indeed, this Commission, the state commissions, and many of the parties have engaged in countless proceedings over many years to set "just and reasonable" rates for various forms of intercarrier compensation. Without the force of section 251(b)(5), carriers would seem to have no statutory duty to enter into reciprocal compensation arrangements with others, let alone an agreement that would require bill and keep. Interconnection obligations would still exist, but it is hard to see how carriers would come to terms without the inclusion of intercarrier compensation provisions. As NARUC points out, without a compensation obligation, carriers would have little "economic incentive to interconnect, to carry … traffic, and to provide high-quality service to requesting carriers."[154]

Even if forbearance were appropriate under the standard set forth in section 10(a), other provisions of section 10 limit the Commission's forbearance powers. As the Commission itself points out, it may not forbear from items required by sections 251(c) and 271 until the Commission makes a finding that those provisions are fully implemented.[155] The Commission concedes that to date it has made no such finding with regard to section 251(c), and the Commission should not do so solely as a means to forbear from section 251(b)(5), which the Commission has found to be "incorporated

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[154] NARUC Principles at 2.
[155] 47 U.S.C. §160(d).

explicitly into section 251(c)."[156] The Commission would have a difficult time finding that it can forbear from an item explicitly incorporated into section 251(c) when, as one example, its implementing rules for section 251(c)(3) have never sustained judicial review.

In any event, even if the Commission could lawfully forbear from section 251(b)(5), whether it would provide the Commission with the desired outcome is unknown. The Commission seems to believe that forbearance from section 251(b)(5) would enable the Commission to mandate a bill-and-keep regime. It is not remotely clear why that would be the case. Moreover, the Commission makes no mention of what statutory authority the Commission would utilize to mandate bill and keep for non-interstate access traffic in the absence of section 251(b)(5), and what statutory authority the Commission would have to set rates at zero. For all of these reasons, the Commission should be cautious in considering use of forbearance to address issues associated with section 251(b)(5).

B. The Commission's Ability To Preempt The Intrastate Access Charge Regime Is Unclear

In the FNPRM, the Commission appropriately seeks comment on its "authority over intrastate access reform, and specifically whether the changes wrought by the 1996 Act give the Commission the power to assert authority over the intrastate charges at issue in this

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[156] *See Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Letter from Carol Mattey, Deputy Chief, Common Carrier Bureau, to Michael L. Shor, Swidler Berlin Shereff Friedman, 16 FCC Rcd 22, 23 (Comm. Car. Bur. 2000).

proceeding."[157] The Commission also seeks comment on whether it may preempt state authority over intrastate access through use of the Commission's section 254 duty to "rationalize universal service support."[158] Although there can be no doubt that the Commission has such a duty, it is far from clear that this provision of the Act gives the Commission authority to preempt the existing intrastate access regime. Indeed, section 254 makes no mention of preemption. Accordingly the Commission should move cautiously, if at all, in this direction.

Just as "preemption occurs when Congress, in enacting a federal statute, expresses clear intent to preempt state law,"[159] Congress similarly can circumscribe the extent to which preemption is permissible under a federal statute. This is exactly what Congress did in the Act through enacting section 253, which establishes the Commission's preemption authority. As Justice Bryer has noted, with the 1996 addition of section 253, Congress "explicitly grant[ed] the FCC a particular preemption tool."[160] The Commission similarly has stated that "[t]he 1996 Act created [s]ection 253 of the Communications Act, which expressly empowers the Commission to preempt state and local laws under certain *specified conditions*."[161]

Further elaborating on section 253 as the source of the Commission's statutory preemption authority, Commissioner Furchtgott-Roth has stated:

> The 1996 Act contemplates that state commissions will play an important part in bringing competition to the local exchange markets, and it gives states freedom to fashion regulatory approaches that supplement the Act's

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157 FNPRM at ¶ 82.

158 *Id.,* citing ICF Supporting Brief at 35.

159 *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 376 (1986).

160 *AT&T v. Iowa Util's Bd.*, 525 U.S. 366 416 (1999)(Breyer, J., concurring in part and dissenting in part).

161 *Section 257 Report to Congress Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses*, Report, 15 FCC Rcd 15376, ¶ 46 (2000) (emphasis added).

> federal requirements. This Commission may interfere with a state commission's requirements *only* pursuant to section 253(d).[162]

Thus, a strong case can be made that the preemption tool provided by Congress to the Commission resides in section 253(d) of the Act, and not in section 254 or any other provision of the Act.

Section 254 presents a weak case for Commission preemption of intrastate access charges for other reasons as well. Foremost, section 253(b) expressly precludes the Commission from preempting "the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[163] There can be no doubt that the states could make a credible case that their individual intrastate access regimes – many of which derive from specific state statutes – are fully consistent with section 253(b), and therefore are insulated from preemption. Accordingly, any effort to use section 254 to issue a declaratory order preempting state access charges would create substantial regulatory risk, which would serve only to frustrate the Commission's unification effort.

In addition, the Commission should recognize that preemption of state commission access charges through section 253(d) similarly would be fraught with legal difficulties. Section 253(d) empowers the Commission to preempt state requirements in two

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[162] *Statement of Commissioner Harold Furchtgott-Roth, Concurring in Parte and Dissenting in Part, Western Wireless Corporation Petition for Preemption of Statutes and Rules and Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the communications Act of 1934*, Memorandum Opinion and Order, 15 FCC Rcd 16227, 16235 (2000) (citation omitted, emphasis added).

[163] 47 U.S.C. § 253(b).

instances.[164] First, the Commission may preempt barriers to entry that exist in cases where a state requirement "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[165] Second, the Commission may preempt state requirements that are "inconsistent with section 254" or are not "competitively neutral."[166] In either instance, the Commission would be required to review individual state statutes, regulations, or other requirements to determine whether preemption under section 253(d) is appropriate. Accordingly, preemption of the intrastate access charge regime under section 253 or otherwise will pose substantial challenges.

The Joint Commenters submit that by far the best way to overcome these challenges is to work with the state commissions through NARUC. As noted throughout these comments, NARUC recognizes the value of unifying the interstate and intrastate access charge system, and the surest way to establish a plan that is consistent with the Act is to work cooperatively with stake holders to the extent practicable. Any premature effort to preempt states rights could have the effect of precipitating litigation based on the states' need to defend their jurisdictional authority under the Act and state law – even in cases where they agree with the Commission's policy goal. Such an outcome would be unfortunate, and the Commission should work hard to avoid a situation where the statutory vehicle pursued by the Commission (*e.g.*, preemption) defeats the outcome desired by essentially all parties, including the state commissions (*i.e.*, unification).

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164 *Id.* at § 253(d).
165 *Id.* at § 253(a).
166 *Id.* at § 253(b).

IX. CONCLUSION

For the reasons set forth herein, the Joint Commenters support the Commission's effort to unify the existing, disparate intercarrier compensation regimes in accordance with the Act and the Commission's policy of encouraging facilities-based competition.

Respectfully submitted,

/s/

Michael B. Hazzard
WOMBLE CARLYLE SANDRIDGE & RICE PLLC
1401 Eye Street, N.W., Seventh Floor
Washington, D.C. 20005

Counsel to KMC Telecom, Inc. and Xspedius Communications, LLC

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